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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

DOCKET No. 455

NORTHERN PACIFIC RAILWAY COMPANY, Et. Al,
Appellants,

vs.

STATE OF MONTANA, Et Al.,
Appellees.

APPELLANTS' REPLY TO PETITION FOR REHEARING

LOUIS E. TORINUS, JR.,
ELDON M. MARTIN,
ELMER B. COLLINS,
BYRON E. LUTTERMAN,
CONRAD OLSON,
MARCELLUS L. COUNTRYMAN, JR.,
Attorneys for Appellants.

ROBERT D. CORETTE,
NEWELL GOUGH, JR.,
Of Counsel.

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Except for complete reversal and direction of entry of judgment in the district court in favor of defendants, the Court's order of December 22, 1952 is the only appropriate disposition of this appeal. Without opinion, the Court has ordered the district court's judgment vacated and has remanded this case for further proceedings in the light of its opinion in *King vs. United States* (No. 9, October term, 1952) decided the same day. The Court's action is clearly compelled by its contemporaneous decision in the *King Case.*

Appellees seek rehearing because of an asserted dissimilarity in the controlling issues in the two cases. In reality there is no dissimiliarity. The petition should therefore be denied.

There were but two issues on which the Court decided the *King Case*. One of those, involving the Interstate Commerce Commission's consideration of passenger deficits in prescribing intrastate freight rates under section 13 (4), is not pertinent here. The other issue was the sufficiency of the Commission's findings to support its thirteenth section order prescribing Florida intrastate freight rates to remove unjust discrimination against interstate commerce (Slip Op., pp. 13-21). The Court held such findings sufficient and sustained the Commission's order.

The Commission's thirteenth section order in the instant case prescribing Montana intrastate freight rates rests upon findings similar to those considered in the *King Case*. Appellees frankly concede that the findings here involved and the findings reviewed in the *King Case* are substantially the same. In the petition for rehearing it is said at page 6:

> "The King Case discusses the Commission's findings in the Florida Case *which are similar to those contained in the Report of the Commission in the Montana Case.*" (Emphasis supplied.)

However, in the *King Case* such findings were held sufficient and in the instant case the court below held them insufficient. Summarizing its conclusions in the last two sentences of its second opinion dated August 13, 1952, 106 F. Supp, at p. 793 (Statement as to Jurisdiction pp. 101-102), the district court said:

> "Accordingly, for the reasons and on the grounds stated, both in this and in our former opinion, both of which are hereby adopted as the findings of this Court, *we hold and conclude that the order here reviewed is not supported by the necessary findings of the Commission* and that the same is void and in excess of the powers of the Commission. A permanent injunction will issue accordingly." (Emphasis ours.)

The contrary conclusion in the *King Case* requires vacation of the judgment below.

Appellees would have this Court believe that the district court not only based its decision on what it conceived to be an inadequacy of the Commission's findings but also on a determination of the sufficiency of the evidence before the Commission. But this contention necessarily fails because appellees cannot point to any statement of the district court which indicates that the evidence before the Commission was either considered by the court or determined not to be adequate. In fact the district court said at 106 F. Supp at p. 792 (Statement as to Jurisdiction, p. 100) that it had no obligation "to delve into the record and go behind the Commission's findings." Quoting from *Florida v. United States*, 282 U. S. 194, at p. 215, it said:

> "'* * * we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body * * *.'"

Appellees' petition for rehearing, which rests upon the premise that the district court did what it stated it was not called upon to do, is clearly without foundation.

It is respectfully submitted that the petition for rehearing should be denied.

Dated this 9th day of January, 1953.

LOUIS E. TORINUS, JR.,
1120 Great Northern Bldg.,
St. Paul 1, Minnesota.
ELDON M. MARTIN,
547 W. Jackson Blvd.,
Chicago 6, Illinois.
ELMER B. COLLINS,
1416 Dodge Street,
Omaha 2, Nebraska.
BYRON E. LUTTERMAN,
609 White Building,
Seattle 1, Washington.
CONRAD OLSON,
MARCELLUS L. COUNTRYMAN, JR.,
1018 Northern Pacific Building,
St. Paul 1, Minnesota.
Attorneys for Appellants.
ROBERT D. CORETTE,
422 Hennessey Bldg.,
Butte, Montana.
NEWELL GOUGH, JR.,
301 First National Bank Bldg.,
Helena, Montana.
Of Counsel.